THE SUPREME COURT OF WASHINGTON
No. 81253-5

No. 58544-4-I
Division One
Washington State Court of Appeals

TANYA GREGOIRE, Guardian for the person and estate of BRIANNA ALEXANDRIA GREGOIRE, a minor, and as personal representative for EDWARD ALBERT GREGOIRE, deceased,

Petitioner,

v.

CITY OF OAK HARBOR, a municipal corporation,

Respondent,

RICHARD WALLACE, and his marital community; BENJAMIN SLAMAN, and his marital community; JOHN DYER, and his marital community; RAYMOND PAYEUR, and his marital community; STEVEN NORDSTRAND, and his marital community; and WILLIAM WILKIE, and his marital community,

Defendants.

RESPONDENT'S SECOND SUPPLEMENTAL BRIEF IN RESPONSE TO BRIEF OF AMICUS CURIAE

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I. INTRODUCTION

Amici counsel, who have had no involvement in the underlying trial or the Court of Appeals proceedings, have submitted a brief on behalf of plaintiff advocating a misguided application of this court's decision in *Wagenblast v. Odessa School District,* 110 Wn.2d 845 (1988), on the issue of whether primary assumption of the risk is a defense available to a municipal jail facility in a case involving an inmate's self inflicted injury. As discussed below, the amicus brief discusses *Wagenblast*, an opinion that plaintiff has never previously referenced, as if the court in that case based its decision to invalidate a written exculpatory agreement utilizing an assumption of risk analysis. It did not. Indeed, Justice Anderson specifically noted that "[b]y our opinion today we do not rule on this question [of whether a "student knowingly encounters one of these risks, but chooses to play on" could be deemed to have expressly assumed the risk of injury]; the law of assumption of risk has developed and will continue to develop on a case-by-case basis and there are no facts before us on the basis of which we can appropriately make any decision on this." *Id.*, at 857. By its own terms, the *Wagenblast* decision has no precedential or persuasive application to the "assumption of risk" issue accepted for review.

Next, amici put forth a conclusory argument advocating the

inapplicability of contributory negligence as a defense to an inmate's self-inflicted injury, relying entirely on a 38-year old Division I decision in *Hunt v. King County,* 4 Wn.App. 14 (1971), and a 91-year old decision by this court in *Kusah v. McCorkle*, 100 Wash. 318 (1918). The brief ignores more recent Washington decisions on contributory fault and decisions from other jurisdictions applying contributory fault in precisely this kind of case, both of which are discussed in respondent's first supplemental brief. Amici's "new" argument based on these old authorities adds little to the scholarly discussion presented in this appeal.

II. ARGUMENT

A. *Wagenblast* is an "Exculpatory Agreement" Case, and the *Wagenblast* Factors Do Not Support a Public Policy Argument to Eliminate Implied Primary Assumption of the Risk as a Defense Against an Inmate's Self-Inflicted Injury.

Justice Anderson was renown in his opinions for clearly identifying and articulating the issue or issues presented for review. In *Wagenblast* he stated the issue as follows:

> Can school districts require public school students [virtually all of whom would be minors] and their parents to sign written releases which release the districts from the consequences of all future school district negligence, before the students will be allowed to engage in certain recognized school related activities, here interscholastic athletics?

110 Wn.2d at 848.

Addressing this narrow issue, Justice Anderson engages in a

comprehensive analysis of the law of contracts, specifically focusing on written "exculpatory agreements." From this analysis, and adopting the legal framework from a California Supreme Court decision[1], he articulates six characteristics, the more of which are present, "the more likely the agreement is to be declared invalid on public policy grounds." *Id.*, at 971. Viewing the exculpatory agreement utilized by the school districts as an "adhesion contract" obtained in "the economic setting of the transaction," derived because of the district's "decisive advantage of bargaining strength against any member of the public who seeks the service," the court held as follows:

> In sum, the attempted releases in the cases before us exhibit all six of the characteristics denominated in *Tunkl* [citation omitted], and for the foresaid reasons, we hold that the releases in these consolidated cases are invalid as against public policy.

Id., at 855-56.

Only after deciding the case on the basis of this contract analysis did Justice Anderson turn his attention to the "doctrine of assumption of risk." Recognizing that "[a]nother name for a release of the sort presented here is an express assumption of risk," the court stated that "[i]f the release is against public policy, however, it is also against public policy to say that the plaintiff has assumed that particular risk." *Id.*, at 973-74. Justice

[1] *Tunkl v. Regents of Univ. of Cal.*, 383 P.2d 441 (1963).

Anderson then makes it clear, as quoted in the Introduction section of this brief, that the opinion was not seeking to develop the law of assumption of risk. *Id.*, at 857.

A careful review of the *Wagenblast* factors, as they have been modified and applied by amici, reveal their complete inapplicability to the narrow issue accepted for review. The factors are all framed under the law of contracts, specifically exculpatory contracts executed in economic situations of unequal bargaining power.

Now granted, an inmate certainly lacks bargaining power with a jail. Likewise, there are similarities in the elements of express and implied primary assumption of the risk. To that very limited extent, amici's brief makes the obvious and correct statements. However, the implied primary assumption of risk doctrine, as it was applied here, cannot be meaningfully assessed under the *Wagenblast* factors.

There is no dispute that Oak Harbor, like all jail facilities, owed Mr. Gregoire a duty to provide for his mental and physical health and safety needs. That does not make the jail an insurer. The specific harm to Mr. Gregoire in this case was his self-inflicted – and ultimately fatal – injury. The broad issue framed in this appeal is whether an inmate, simply by virtue of his incarceration, should be relieved as a matter of law from any consequences for his or her own self-destructive behavior. As this

court noted in *Kirk v. Washington State University*, 109 Wn.2d 448, 454-55 (1987):

> Assumption of the risk may act to limit recovery but only to the extent the plaintiff's damages resulted from the specific risks known to the plaintiff and voluntarily encountered. To the extent a plaintiff's injuries resulted from other risks, created by the defendant, the defendant remains liable for that portion.

Since the jury in this case decided the case on a lack of proximate cause, there is no issue in this appeal as to how the doctrine of assumption of risk was or should be applied to Mr. Gregoire's act of suicide. As such, whether Mr. Gregoire was of sound mind, whether he fully appreciated the risk of placing a ligature around his neck, whether he even actually intended to suffocate himself, and related questions, are not present in this appeal. As Justice Anderson noted in *Wagenblast*, the law of assumption of risk develops on a case-by-case basis, derived from the unique facts of each dispute. The broader policy question here, if decided in favor of plaintiff and amici, would permanently alter the legal landscape for all governmental entities operating custodial facilities. As discussed in respondent's first supplemental brief, arguments that will not be repeated here, this court should not permanently absolve all inmates from any responsibility to avoid self-inflicted injury. Rather, the applicability of the doctrine of primary assumption of risk should be left for decision on a

case-by-case basis.

B. Amici's Brief Does Not Alter the Analysis of Contributory Fault as Articulated in Respondent's First Supplemental Brief.

Respondent's first supplement brief fully discusses the *Hunt* decision, as well as cases from other jurisdictions that have addressed the applicability (or non-applicability) of contributory fault in cases of inmate self-inflicted injury. Amici ignore these other cases entirely and add little to the understanding of *Hunt.*

The only "new" aspect of Amici's brief is the limited discussion of the 1918 decision in *Kusah.* The plaintiff in that case was stabbed in jail by a fellow inmate. He sued the sheriff, alleging negligence in failing to properly screen and search the inmate (Reisch), and sued Reisch for his misconduct. The sheriff asserted, among other defenses, that plaintiff was contributorily negligent. The court found there to be no facts to support this defense, but said nothing about the applicability of the defense to custodial situations. It stated:

> It is urged by appellants that the negligence, if any, was the contributory negligence of respondent. This is based upon the fact that the respondent was shown to have had knowledge that Reisch was charged with insanity, and was detained as an insane suspect, and that, if he had any knife in his possession, being confined with respondent and the other prisoners together, respondent must have known of the possession of the knife by Reisch. We can see nothing in this contention, and think that merely to state it is to determine its fallacy. At any rate respondent's testimony

> was that he did not know that Reisch had a knife until the time of the affray. He certainly was not chargeable with knowledge of any negligence of the sheriff and his deputy in omitting to search and in confining Reisch in the common room of the jail with him for both he and Reisch were in the sole power of the sheriff and his deputy. It would certainly be an inhuman rule that would require any care and caution on the part of an inmate of a jail as to the performance or nonperformance of the duty of his keepers toward him.

Id. at 326.

This analysis does not address the issue accepted for review. Amici speculate that the giving of the contributory fault instructions "might well have led the jury to conclude that Mr. Gregoire's contributory negligence was the sole proximate cause of his death." To the contrary, the jury never reached the question of contributory fault.

III. CONCLUSION

The policy question presented here is whether inmates should be relieved of all responsibility to avoid self-destructive behavior, shifting the liability for their acts to the jail facility. Providing this immunity would effectively make all inmates "fault free" plaintiffs for purposes of imposing joint and several liability on the part of the custody facility. Instead of adopting a blanket rule of immunity, the court should allow the principle of fault allocation to be applied on a case-by-case basis.

Respectfully submitted this 15th day of May, 2009.

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